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No. 00-1092

Supreme Court, U.S.
FILED
2001
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IN THE

Supreme Court of the United States

GARY O. BARTLETT, in his official capacity as Executive Director of the State Board of Elections of the State of North Carolina; LARRY LEAKE, in his official capacity as Chairman of the State Board of Elections; S. KATHERINE BURNETTE, in her official capacity as Secretary of the State Board of Elections; JUNE K. YOUNGBLOOD, DOROTHY PRESSER, FAIGER M. BLACKWELL, in their official capacity as Members of the State Board of Elections; MICHAEL F. EASLEY, Attorney General of the State of North Carolina; COLON WILLOUGHBY, in his official capacity as District Attorney for the 10th Judicial District; WILLIAM H. ANDREWS, in his official capacity as District Attorney for the 4th Judicial District; and C. BRANSON VICKORY, III, in his official capacity as District Attorney for the 8th Judicial District,

Petitioners,

v.

WILLIAM BRYANT PERRY;
FARMERS FOR FAIRNESS, INCORPORATED

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals correctly held that North Carolina's statute is unconstitutionally overbroad because it obliterates *Buckley v. Valeo's* bright-line express advocacy test by permitting regulation of communications that simply name a candidate, are not solely informational and where the stated subjective intent of the speaker is to support or oppose a candidate.

PARTIES TO THE PROCEEDING

Gary O. Bartlett, Larry Leake, June K. Youngblood, Dorothy Presser, Rose Vaughn Williams, and Dawn Baxton, in their official capacities as Executive Secretary-Director, Chairman, and members of the North Carolina State Board of Elections, Michael F. Easley in his official capacity as Attorney General of North Carolina, and other defendant district attorneys are petitioners in this case and were defendants-appellants below.

Farmers for Fairness, Inc. is a trade association of corporations and individuals involved in the production of hogs, and William Bryant Perry is an individual who benefits from, and wishes to continue to benefit from, advertisements sponsored by Farmers for Fairness, Inc. Farmers for Fairness, Inc. and William Bryant Perry are respondents in this case and were plaintiffs-appellees below.

CORPORATE DISCLOSURE

There is no parent or publicly held company owning 10% or more of stock in Farmers for Fairness, Inc.

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The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 231 F.3d 155 (4th Cir. 2000), and the order of the court of appeals amending its opinion (Pet. App. 23a) is reported at 231 F.3d 155 (4th Cir. 2000). The opinion of the district court (Pet. App. 25a-34a) is reported at 1999 U.S. Dist. LEXIS 5881 (E.D.N.C. 1999). The opinion of the district court on the motion to reconsider (Pet. App. 35a-46a) is unreported. The order of the North Carolina State Board of Elections (Pet. App. 47a-65a) is unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on October 3, 2000 (Pet. App. 67a). The petition for writ of certiorari was filed on January 2, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First (Pet. App. 69a) and Fourteenth Amendments to the Constitution of the United States and the relevant provision of the North Carolina Revised Statutes, N.C. GEN. STAT. § 163-278.12A (Pet. App. 71a-72a) are set forth in the Petitioner's Appendix.

STATEMENT OF THE CASE

A. Procedural Background

North Carolina General Statute § 163-278.12A regulates political expression by placing a duty to report on any individual, person or political committee that makes an expenditure, whether or not in an election year, for printed material or advertisements broadcast or distributed if the printed material or advertisement names a candidate. There is an exception to this general duty to disclose for material that is solely informational and where there is no subjective intent

to advocate the election or defeat of a candidate or prospective candidate.

Farmers for Fairness, Inc. and William Bryant Perry (respondents) brought a facial challenge to § 163-278.12A on the grounds that the statute was vague and overbroad for unconstitutionally permitting the regulation of protected issue discussion by redrawing the bright-line definition of the express advocacy test laid down by this Court in *Buckley v. Valeo*, 424 U.S. 1 (1976). Respondents also challenged a second statute which the Court of Appeals for the Fourth Circuit held was facially unconstitutional in a separate case after this action was filed. *See North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999), *cert. denied*, 120 S. Ct. 1156 (2000) (Court denying certiorari on an issue unrelated to this case).

Petitioners are incorrect in stating that respondents sought an injunction prohibiting enforcement of an order entered by the North Carolina State Board of Elections; rather, respondents sought to enjoin enforcement of the statutes at issue. Pet. App. 8a. The district court, in ruling on cross-motions for summary judgment, found the challenge to § 163-278.12A to be mooted by the Fourth Circuit's ruling in *North Carolina Right to Life*, but permanently enjoined the State from enforcing the statute. Pet. App. 32a. The district court denied petitioners' motion to reconsider the ruling on mootness. Pet. App. 37a.

Petitioners appealed, and the court of appeals held that the district court erred in ruling that the constitutionality of § 163-278.12A was mooted by its decision in *North Carolina Right to Life*. Pet. App. 9a-10a. The Fourth Circuit addressed the constitutionality of the statute and concluded that it was unconstitutional, noting this Court's "effort to alleviate uncertainty" by "adopt[ion] of a bright-line rule to determine when political expression may be regulated." Pet. App. 10a. The court of appeals found that "[t]his bright-line rule requires the use of express or explicit words of advocacy of the election or defeat of a candidate before the

communication may be regulated." Pet. App. 10a (citing *Buckley v. Valeo*, 424 U.S. 1, 42 (1976)).

Noting several other circuit and district court decisions "categorically rejecting any attempt to dilute the bright-line express advocacy standard," Pet. App. 13a, the Fourth Circuit continued its "steadfast[] adhere[nce] to the bright-line 'express advocacy' test from *Buckley*," Pet. App. 11a, and refused to "recognize an exception to the 'express advocacy' test when the entity admits, outside of the advertisement, that it is trying to defeat a particular candidate." Pet. App. 12a. Otherwise, the speaker is "'wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.'" Pet. App. 13a (quoting *Buckley*, 424 U.S. at 43).

Furthermore, the court of appeals found that under the State's test, it was unclear which statements of intent made outside the context of an advertisement would leave the entity subject to regulation, and whose statement of intent could bind the organization. Pet. App. 13a. Therefore, the court "decline[d] the State's offer to abandon the rule of *Buckley* and to allow the State of North Carolina to regulate political expression, which on its face is issue advocacy, when the speaker acknowledges an intent to influence the outcome of an election." Pet. App. 13a-14a. Accordingly, the court of appeals found § 163-278.12A unconstitutionally overbroad and permanently enjoined the State from enforcing it. Pet. App. 14a.

B. Factual Background

The North Carolina State Board of Elections conducted a hearing to investigate allegations by an individual that was a subject of Farmers for Fairness, Inc.'s issue advertisements. The Board's findings can be found at Pet. App. 47a-65a. Farmers for Fairness, Inc. had been running issue advertisements that were critical of the positions several legislators had taken on agricultural issues. Pet. App. 52a-55a. These advertisements, as petitioners readily admit, did

not contain explicit or express words of advocacy, as described in *Buckley*. Pet. App. 12a. Petitioners erroneously state that the purpose of the advertisements was to defeat a specific legislator; rather, Farmers for Fairness, Inc. admitted that "both the purpose and effect of such advertisements would be to *influence* her election." Pet. App. 79a (emphasis added).

REASONS FOR DENYING THE PETITION

The court of appeals was correct in holding that express words of advocacy are required to be contained within a communication before such speech may be regulated. This holding is compelled by this Court's decision in *Buckley* and does not conflict with any decision of this Court or of any other court of appeals. No reason therefore exists for this Court to review this case or reexamine the contours of the express advocacy test. Indeed, the Court has twice since *Buckley* denied petitions for writs of certiorari in cases raising such issues. *See Maine Right to Life Comm. v. Federal Election Comm'n*, 522 U.S. 810 (1997); *Faucher v. Federal Election Comm'n*, 502 U.S. 820 (1991).

I. THE COURT OF APPEALS' HOLDING THAT EXPRESS WORDS OF ADVOCACY MUST BE CONTAINED WITHIN A COMMUNICATION BEFORE SUCH SPEECH MAY BE REGULATED DOES NOT MERIT THIS COURT'S REVIEW.

The court of appeals correctly held (Pet. App. 13a) that permitting the regulation of speech based on a speaker's intent "would create a legal standard that would be the antithesis of the bright-line express advocacy test developed in *Buckley*." The court of appeals' adherence to *Buckley's* bright-line is consistent with every other federal court to consider the issue, for as the court of appeals noted, "[i]t is therefore clear that courts have only allowed regulation of campaign speech when there are words of express advocacy in the communication itself." Pet. App. 12a.

A. The court of appeals' decision is compelled by this Court's precedential decisions in *Buckley v. Valeo* and *Federal Election Commission v. Massachusetts Citizens for Life.*

As the court of appeals correctly stated, petitioners' argument is "undermined by *Buckley* and its progeny." Pet. App. 13a. This Court in *Buckley* developed the "express advocacy" test in order to place constitutional limits on two challenged provisions of the Federal Election Campaign Act: (1) then-section 608(e)(1), which placed a $1,000 annual cap on "expenditure[s] relative to a clearly-identified candidate," *Buckley*, 424 U.S. at 39, and (2) then-section 434(e), which required persons making expenditures "aggregating over $100 in a calendar year . . . to file a statement with the Commission." *Id.* at 75. The *Buckley* Court found that in the absence of a constitutionally-mandated narrowing construction, both of these provisions would be unconstitutional on the basis of vagueness and overbreadth.[1]

Buckley's narrowing construction of the statutory phrase "relative to" was required because

> the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are often intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.

Id. at 42. Therefore, to ameliorate this problem, the *Buckley* Court settled on the "express advocacy" standard as the line of demarcation between the protected and the regulable.

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[1] *Buckley* itself did not expressly rely on overbreadth, but was characterized as such in *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 248 (1986).

The *Buckley* Court, in drawing this line, found that only communications "that include explicit words of advocacy of election or defeat of a candidate," *id.* at 43, or "contain[] express words of advocacy of election or defeat," *id.* at 44 n.52, could be regulated. In *Buckley's* famous footnote, the Court provided an illustrative list of which terms could be "express words of advocacy:" "'vote for', 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n.52.

This bright-line distinction was necessary the *Buckley* Court reasoned because

> whether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation . . . . and . . . puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.
>
> Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Id. at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)). Therefore, the Court found that "[t]he constitutional deficiencies described in *Thomas v. Collins* can be avoided only by reading § 608(e)(1) as limited to communications that include explicit words of advocacy of election or defeat of a candidate." *Id.*

Similarly, with respect to then-section 434(e), the *Buckley* Court found that the phrase, "for the purpose of influencing" an election, which defined an "expenditure" which must be reported to the Federal Election Commission if more than $100, "shares the same potential for encompassing

both issue discussion and advocacy of political result." *Id.* at 79. As a result, "[t]o insure that the reach of § 434(e) is not impermissibly broad, we construe 'expenditures' . . . to reach only funds for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80. "As narrowed, § 434(e) . . . does not reach all partisan discussion for it only requires disclosure of those expenditures that expressly advocate a particular election result," *id.*, and is thus "narrowly limited to those situations where the information sought has a substantial connection with the governmental interests sought to be advanced." *Id.* at 81.

The only other case in which this Court has applied the "express advocacy" test is *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986). The Court stated that "*Buckley* adopted the 'express advocacy' requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons." *Id.* at 249. The *MCFL* Court unanimously reaffirmed *Buckley's* "express advocacy" test, holding that "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b," which prohibits corporate contributions and expenditures in connection with a federal election. *Id.* Citing to footnote 52 in *Buckley*, the Court reiterated its holding that "a finding of 'express advocacy' depend[s] upon the use of language such as 'vote for,' 'elect,' 'support,' etc." *Id.* (quoting *Buckley*, 424 U.S. at 44 n.52).

Therefore, *Buckley* and *MCFL* when read together establish a bright-line express advocacy test prohibiting regulation of speech, i.e., issue advocacy, unless a clear directive to vote and a clearly identified candidate lie within the four corners of the communication.

The court of appeals correctly determined that the outcome of this case is compelled by *Buckley* and then correctly applied this Court's precedents. First, the court of appeals correctly stated that *Buckley's* "bright-line rule requires the use of express or explicit words of advocacy of

the election or defeat of a candidate before the communication may be regulated." Pet. App. 10a (citing *Buckley*, 424 U.S. at 42). Continuing, the court of appeals noted this Court's statement in *Buckley* that "'the distinction between discussion of issues and candidates and advocacy of issues and candidates may often dissolve in practical application.'" *Id.* (quoting *Buckley*, 424 U.S. at 42). It was the ability of issue and candidate discussion to blur, the court of appeals observed, that was the reasoning behind this Court's refusal "to adopt a standard allowing regulation of any advertisement that mentions a candidate's stand on an issue." Pet. App. 10a (citing *Buckley*, 424 U.S. at 42-43).

Noting that Farmers for Fairness, Inc.'s "communications in and of themselves are not 'express advocacy' of the kind described in *Buckley*," the court refused to adopt the State's argument that as long as the entity admits the purpose of the advertisement is to defeat a candidate, the communication meets *Buckley's* express advocacy test. Pet. App. 12a. The court found that express words of advocacy within a communication are required before speech may be subject to regulation because under the petitioners' test it would be "unclear which statements of intent made outside the context of an advertisement would leave the entity subject to regulation under North Carolina law." Pet. App. 13a. "Discerning the 'intent' of an organization thus can be problematic," and therefore, "[c]ertain groups might be disinclined to engage in political speech, fearful that someone in the group would make a public statement of the group's intent in a particular ad, thus subjecting the group to regulation." Pet. App. 13a. Like the statute in *Buckley*, such a test "would leave the speaker 'wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.'" Pet. App. 13a (quoting *Buckley*, 424 U.S. at 43). Thus, § 163-278.12A creates, rather than "alleviate[s] [the] uncertainty" that led to the Supreme Court's adoption of "a bright-line rule to determine when political expression may be regulated." Pet. App. 10a. In short, the court of appeals

found that § 163-278.12A "would create a legal standard that would be the antithesis of the bright-line express advocacy test developed in *Buckley*." Pet. App. 13a. The court of appeals thus found North Carolina's statute unconstitutional and enjoined its enforcement. Pet. App. 14a.

B. All other federal courts have consistently required communications to meet *Buckley's* constitutionally-mandated express advocacy test before permitting regulation of speech.

The court of appeals' decision does not conflict with any decision of this Court or of any court of appeals, and is overwhelmingly consistent with the decisions of numerous district courts. *See* Pet. App. 12a ("It is therefore clear that courts have only allowed regulation of campaign speech when there are words of express advocacy in the communication itself."). Both courts below, consistent with every court of appeals that has addressed the issue, correctly held that replacing the express words of advocacy test with an intent test obliterates the bright-line established in *Buckley* as constitutionally required. Courts have found the bright-line is required both to establish a line of demarcation between the protected and the regulated, and to prevent government from regulating protected issue advocacy. *See generally* Bopp & Coleson, *The First Amendment is Not a Loophole: Protecting Free Expression in the Election Campaign Context*, 28 U. West L.A. L. Rev. 1 (1997). Petitioners cite no decision of any federal court, and we are aware of none, straying from the bright-line test by adopting a subjective intent test. Further review is therefore not warranted.

The federal appellate courts that have applied *Buckley* and *MCFL* have faithfully adhered to the "explicit" or "express" words of advocacy test according to its plain terms and have refused to broaden the definition of express advocacy. *See Florida Right to Life v. Lamar*, 2001 U.S. App. LEXIS 613 (11th Cir. Jan. 17, 2001) (affirming *per curiam*, the district court's holding that express words of advocacy are required before allowing government regulation

of speech); *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 2000 U.S. App. LEXIS 33727, at *47-48 (10th Cir. Dec. 26, 2000)(finding a statute unconstitutional which regulated communications which "unambiguously refers to such candidate" because the statute could not be construed to reach only communications which contained explicit words advocating the election or defeat of a clearly identified candidate); *Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 387, 388 (2d Cir. 2000) (court finding two disclosure statutes unconstitutional for reaching "advocacy with respect to public issues, which is a violation of the rule enunciated in *Buckley* and its progeny."); *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 712-13 (4th Cir. 1999) (court finding definition of "political committee" overbroad because it included organizations that merely wished to influence an election through issue advocacy); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 969 (8th Cir. 1999) ("Questions of intent and effect, however, are to be excluded from the [express advocacy] analysis, since a speaker, in such circumstances, could not safely assume how anything he might say would be understood by others."); *Virginia Soc'y for Human Life, Inc. v. Caldwell*, 152 F.3d 268, 274 (4th Cir. 1998)(court finding phrase "for the purpose of influencing the outcome of any election "may be narrowly construed to limit the application of those statutes to groups that expressly advocate the election or defeat of a clearly identified candidate."); *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503, 506 (7th Cir. 1998)("Because of the vital importance in protecting such speech, the Buckley Court articulated what has come to be known as the 'express advocacy' test. . . ."); *Federal Election Comm'n v. Christian Action Network*, 110 F.3d 1049, 1062 & n.12 (4th Cir. 1997)(The *Buckley* Court was clear "that it meant by the phrase 'express advocacy' nothing more or less than 'express words of advocacy' . . . . [T]he Court never suggested that communications with no words of advocacy at all can nonetheless be considered 'express advocacy.'"); *Federal Election Comm'n v. Christian Action*

Network, 894 F. Supp. 946, 948 (W.D. Va. 1995) (holding that ads that did not contain "explicit words or imagery advocating electoral action" constituted protected issue advocacy and not electioneering subject to regulation), *aff'd per curiam*, 92 F.3d 1178 (4th Cir. 1996); *Maine Right To Life Comm. v. Federal Election Comm'n*, 914 F. Supp. 8, 12 (D. Maine 1996) ("What the Supreme Court did [in adopting the 'express advocacy' test] was draw a bright line that may err on the side of permitting things that affect the election process, but at all costs avoids restricting, in any way, discussion of public issues."), *aff'd per curiam*, 98 F.3d 1 (1st Cir.)("[W]e affirm for substantially the reasons set forth in the district court opinion."); *Faucher v. Federal Election Comm'n*, 928 F.2d 468, 472 (1st Cir. 1991)("In our view, trying to discern when issue advocacy in a voter guide crosses the threshold and becomes express advocacy invites just the sort of constitutional questions the Court sought to avoid in adopting the bright-line express advocacy test in *Buckley*."); *Federal Election Comm'n v. Central Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 53 (2d Cir. 1980)(*en banc*) (FEC's definition of "expressly advocating the election or defeat" effectively included "implied" advocacy and was, therefore, "totally meritless.").[2]

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[2] Likewise, federal district courts have rejected tests permitting regulation of speech based on intent, context, or name or likeness, and instead have held that before a communication may be regulated, it must contain express or explicit words of advocacy. *See Federal Election Comm'n v. Christian Coalition*, 52 F. Supp.2d 46, 61 (D.D.C. 1999) (holding that under the express advocacy test, the communication "must in effect contain an explicit directive" which "is determined first and foremost by the words used."); *Kansans for Life, Inc. v. Gaede*, 38 F. Supp.2d 928, 935-37 (D.Kan. 1999) (enforcement policy of state was unconstitutionally vague where it did not restrict regulation to advertisements containing express advocacy); *Right to Life of Michigan, Inc. v. Miller*, 23 F. Supp.2d 766 (regulation prohibiting corporate communications containing the "name or likeness of a candidate" within 45 days of an election facially overbroad); *Planned Parenthood Affiliates of Mich., Inc. v. Miller*, 21 F. Supp.2d 740 (E.D. Mich. 1998)(same); *Right to Life of Dutchess County, Inc. v. Federal Election Comm'n*, 6 F. Supp.2d

Even *Federal Election Comm'n v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), often cited as the lone possible dissenter, found that express advocacy must be contained within the message itself and that the intent of the speaker is irrelevant:

> [h]aving established that the emphasis must always be on the literal words of the communication, with little if any weight accorded external contextual factors . . . . the [*Furgatch*] court repeatedly emphasized that the message of candidate advocacy

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248 (S.D.N.Y. 1998)(FEC's contextual definition of "expressly advocating" facially overbroad); *Clifton v. Federal Election Comm'n*, 927 F. Supp. 493, 496 (D. Maine 1996)("[T]he United States Supreme Court explicitly has narrowed FECA's very broad prohibition against corporate election-related spending to a prohibition on spending involving express advocacy of the election or defeat of a clearly identified candidate or candidates. . . . The Court has ruled that spending for issue advocacy, on the other hand, cannot be stopped."), *aff'd on other grounds*, 114 F.3d 1309 (1st Cir. 1997); *West Virginians for Life, Inc. v. Smith*, 919 F. Supp. 954, 959 (S.D.W.Va. 1996)("[*Buckley* and *MCFL*] adopted a bright-line rule for determining whether advocacy is express advocacy and therefore subject to regulation, or issue advocacy which may not be regulated."); *Federal Election Comm'n v. Survival Educ. Fund, Inc.*, 1994 WL 9658, at *3 (S.D.N.Y. Jan. 12, 1994) ("[E]xpressions of hostility to the positions of an official, implying that the official should not be reelected -- even when the implication is quite clear -- do not constitute [] express advocacy. . . ."), *aff'd in part and rev'd in part on other grounds*, 65 F.3d 285 (2d Cir. 1995); *Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 839 F. Supp. 1448, 1456 (D. Colo. 1993)("Trying to determine whether the surrounding circumstances, coupled with the implications of the advertisement, constitute 'express advocacy' leads to the type of semantic dilemma which the [Supreme] Court sought to avoid by adopting the bright-line rule."), *rev'd*, 59 F.3d 1015 (10th Cir. 1995), *vacated and remanded on other grounds*, 116 S. Ct. 2309 (1996); *Federal Election Comm'n v. NOW*, 713 F. Supp. 428 (D.D.C. 1989)(solicitation letters, which criticized candidates, were discussions of public issues which by their nature raised the names of candidates and therefore, were not express advocacy); *Federal Election Comm'n v. AFSCME*, 471 F. Supp. 315, 317 (D.D.C. 1979)("[A]lthough the poster includes a clearly identified candidate and may have tended to influence voting, it contains communication on a public issue widely debated during the campaign. As such, it is the type of political speech which is protected from regulation. . . .").

> must appear in the speech, in the words, of the communication if the expenditure of corporate funds for that communication is to be prohibited. . . . The court's almost exclusive focus on "speech," and specifically "speech" defined as the literal words or text of the communication, could not have been any clearer. . . .

Christian Action Network, 110 F.3d at 1053 (quotations and citations omitted). Therefore, there is no conflict in the circuits and further review of this case is not warranted.

II. THERE IS NO REASON FOR THIS COURT TO REVISIT ITS DECISION IN *BUCKLEY V. VALEO*.

Petitioners erroneously argue that the *Buckley* Court crafted the express advocacy test to be a "proxy for intent" (Pet. App. 12), and therefore, the *Buckley* Court did not intend that its decision would foreclose regulation of electoral advocacy perceived to be masquerading as issue discussion. However, the twenty-five year old *Buckley* decision does not merit revisiting for two reasons.

A. The decision below was correctly decided.

Petitioners suggest that the decision below distorts *Buckley*, in a manner not contemplated by this Court, and further encourages "covert speech" (Pet. App. 20) because speakers can avoid using express words of advocacy while discussing the issues and therefore, avoid disclosure requirements. Far from finding such speech "covert," the *Buckley* Court put its imprimatur on issue discussion that influences the election or defeat of a candidate:

> [s]o long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views.

Buckley, 424 U.S. at 45. Later, the *Buckley* Court reiterated its command that partisan issue advocacy remain unfettered even though it may influence an election:

> As narrowed, § 434(e), like § 608(e)(1), does not reach all partisan discussion for it only requires disclosure of those expenditures that expressly advocate a particular election result.

Id. at 80. The *Buckley* Court presciently recognized that its bright-line test might result in circumvention, but nonetheless found that only the bright-line standard would guarantee protection of the discussion of issues:

> [t]he exacting interpretation of the statutory language necessary to avoid constitutional vagueness thus undermines the limitation's effectiveness as a loophole-closing provision by facilitating circumvention by those seeking to exert improper influence upon a candidate or officeholder. It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign.

Id. at 45. As the above quoted *Buckley* passages show, the Court put its approval on speech that supports or criticizes candidates as long as such speech avoids express words of advocacy.

Therefore, as the *Buckley* Court has already addressed petitioners' argument, further review of this case is not warranted. Petitioners also cite no authority supporting their position, nor do they identify any persuasive reasons for this Court to reconsider the settled legal principles set out in *Buckley* on which scores of courts have relied.

Petitioners also argue that *Buckley* does not foreclose their reliance upon intent to determine whether electoral advocacy has occurred. However, *Buckley* dismisses this argument as well, foreclosing the need for further review of this case. The *Buckley* Court stated that the "constitutional deficiencies described in *Thomas v. Collins*," which are shared by the statute at issue in this case,

> can be avoided *only* by reading § 608(e)(1) as limited to *communications* that *include* explicit words of advocacy of election or defeat of a candidate, much as the definition of "clearly identified" in § 608(e)(2) requires that an explicit and unambiguous reference to the candidate appear as part of the *communication*.

Buckley, 424 U.S. at 43 (emphases added). The Court's choice of words belies petitioners' argument. The constitutional deficiencies in this case "can be avoided *only* by" permitting government regulation of "communications that in express terms advocate the election or defeat of a clearly identified candidate." *Id.* at 44 (emphasis added). The phrase "that in express terms," tells us which communications are subject to regulation. Therefore, only communications that actually contain these express terms advocating the election or defeat of a clearly identified candidate may be subject to regulation.

Buckley's footnote 52 also lends support to this construction. The Court provided an illustrative list of what would meet its requirement of "express terms." The *Buckley* Court stated that "[t]his construction would restrict the application of § 608(e)(1) to communications *containing* express *words* of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n.52 (emphases added). Thus, the *Buckley* Court's choice of language supports, and indeed requires, the court of appeals' holding that express words of advocacy must be contained

within a communication before it may be subject to regulation in the form of disclosure.

Not only has this Court previously addressed petitioners' arguments, the *Buckley* Court correctly decided them. To implement its holding that the discussion of issues, vital to our democracy, remain constitutionally protected, the *Buckley* Court crafted two tests: the express advocacy test and the major purpose test. To prevent chill on the discussion of issues by allowing a speaker to know in advance whether his speech is protected, and to prevent government from regulating issue discussion, the *Buckley* Court created a test that would examine whether the speaker was *actually* engaged in electoral advocacy. As in *MCFL*, a speaker can engage in electoral advocacy without intending to do so. But to determine whether actual express advocacy has occurred, the court of appeals, consistent with *Buckley*, required that a communication contain express words of advocacy, lest the speaker be at the mercy of the varied hearers and refrain from speaking. Thus, not only did the *Buckley* Court answer petitioners' arguments, it did so correctly, in a manner that fully protects the discussion of issues. Therefore, the court of appeals' decision was correctly decided and further review is not warranted.

B. Principles of *stare decisis* apply.

Petitioners contend (Pet. App. 20) that this Court should "revisit" its decision in *Buckley*, supra. Although "stare decisis is not an inexorable command, particularly when [the Court is] interpreting the Constitution, even in constitutional cases, the doctrine carries such persuasive force that [the Court has] always required a departure from precedent to be supported by some special justification." *Dickerson v. United States*, 120 S. Ct. 2326, 2336 (2000) (citations and internal quotation marks omitted). Petitioners have failed to identify any "special justification" that would warrant reconsideration of *Buckley*.

This doctrine applies with special persuasive force in this case where there are over twenty-five cases that have based their holdings upon *Buckley's* requirement that express words of advocacy be contained within a communication. Furthermore, the Federal Election Campaign Act, 2 U.S.C. § 431(9), the Code of Federal Regulations, 11 CFR § 100.22, and numerous state statutes, *e.g.*, Ariz. Rev. Stat. § 16-901.01 (2000)(defining express advocacy); Iowa Code § 56.2(14) (2000)(defining express advocacy); Ky. Rev. Stat. § 121.015(12)(2000); N.H. Rev. Stat. Ann. § 664:2(XI)(2000); Or. Rev. Stat. § 260.005(8)(c)(2000); W. Va. Code § 3-8-2(c)(2000), base their definitions of expenditure and independent expenditure upon *Buckley's* holding that the only way to determine whether speech is electoral advocacy, without violating the First Amendment, is whether a communication itself contains express words of advocacy. Therefore, principles of *stare decisis* apply here and no special justification exists for the Court to revisit its decision in *Buckley*.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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